IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 729/2003

In the case between:

PAPI PATRICK MIYEN Plaintiff

and

SASOL INFRECHEM LIMITED Defendant

JUDGEMENT: RAMPAI J

HEARD ON: 31 NOVEMBER 2006

DELIVERED ON: 15 FEBRUARY 2007

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[1] The matter came to this court by way of action proceedings. The plaintiff acts in his personal capacity. He sues the defendant for damagers under three distinct claims. The basis of each claim is mainly contractual and alternatively delictual. The relief sought in respect of each claim is contested. The defendant resists each individual claim on the selfsame fundamental basis that no contract was concluded by its predecessor in title Polifin with the plaintiff in his personal capacity. On the strength of this averment the defendant contents that the plaintiff lacks the requisite *locus standi in indicio* to bring the action. The distinction between Polifin and Sasol Infrachem Limited is,

for the purpose of this judgment, immaterial. I refer to them collectively as the defendant.

[2] I deem it necessary to give a cursory résumé of the pleadings. I propose to deal with them claim by claim. It is also convenient to dissect the plea in a similar and corresponding manner. In this way each of the defendant's three pleas will be close to each of the plaintiff's three claims to which each relates. I reckon such pairing makes practical sense.

[3] The particular of claim in respect of the first claim are set out in paragraph 4 and 5 of the summons. The plaintiff alleged that he and the defendant concluded an agreement at Sasolburg during August 1999. He was employed by the defendant. He was engaged under a service system called Owner Driver Scheme for a five year contract period. He was personally obliged to render certain transportation services on behalf of the defendant. He was also obliged to provide his own heavy vehicle for this purpose.

[4] The defendant's reciprocal contractual obligations were the following: First, the defendant was obliged to pay the monthly instalment owing by the plaintiff to the finance company in respect of the vehicle direct to the finance company from the gross monthly income due by the defendant to the plaintiff. Second, the defendant was also

obliged to deduct a certain amount from the gross monthly income due by the defendant to the plaintiff and to pay it over direct to the South African Revenue Service in respect of the plaintiff's income tax. Third, the defendant was obliged to pay the surplus of the gross monthly income direct to the plaintiff. Vide Annexure "A" paragraph 11 of the record. The plaintiff's company's identity or number under the Owner Driver Scheme was OD189.

[5] The aforegoing were the express terms. But there were also tacit terms and implied terms governing the said agreement which agreement was partly written and partly oral. The plaintiff alleged that he complied with all the terms of the agreement and that at all material times he was prepared to perform his contractual obligations.

[6] The plaintiff also alleged that notwithstanding his performance in terms of the agreement, the defendant wrongfully committed a breach of the said contract at Sasolburg on the 31 October 2001. He alleged that an authorised agent of the defendant Carlos da Silva prevented him from rendering or providing further services as agreed by depriving him of the physical possession of the truck as well as his personal belongings in the truck.

[7] As a result of the aforesaid wrongful dispossession in other words the breach whereby the defendant prevented him

from removing his property from his truck which the defendant had wrongfully seized and grounded, the plaintiff alleged that he suffered damages in the sum of R5 249,00. The alleged property was specified and itemised in paragraph 7 of the summons. In support of this claim “annexure a” was attached to the summons.

[8] As regards the plaintiff’s first claim, the defendant admitted, in its plea, that various stakeholders, including the parties herein entered into a written agreement at Sasolburg during August 1999. The multiparty agreement was described as the “operating agreement” and was apparently last signed on the 31st of August 1999. Its effective date was 1st September 1999 and its duration 60 months – vide page 53 of the record. It was attached to the defendant’s plea as “annexure S1”.

[9] The defendant specifically denied that the rights and duties ascribed to the plaintiff in the summons, attached to the plaintiff personally. The defendant stated that such rights and obligations stemmed from the “Multiparty Operating Agreement” and pleaded that such rights were acquired and such obligations incurred by Midland Truck 29 CC, the contractor, and not the plaintiff, in his personal capacity.

The defendant also pleaded that the plaintiff was a crew member of the contractor, MT29CC and that he originally held a

24% membership interest in the contractor.

[10] The defendant further pleaded that the motor vehicle referred to in the plaintiff's summons was a heavy truck with registration number CKC982FS and that it was the same motor vehicle described in the "Multi Party Operating Agreement". The defendant denied that the plaintiff personally purchased the motor vehicle but pleaded that it was purchased by the contractor, MT29CC, in terms of an instalment sale agreement which was financed by FBC Fidelity Bank Limited t/a the Future Bank and that it was registered in the name MT29CC and not in the plaintiff's name.

[11] The defendant averred furthermore that the "Multi Party Operating Agreement" was terminated during April 2000 consequent upon the liquidation of the company Professional Drivers Management & Development (Pty) Ltd t/a Pro-Drive. Subsequent to the demise of Pro-Drive, the defendant and MT29CC entered into an oral bilateral agreement at Sasolburg during April 2000. It was agreed that the defendant would continue with the Owner Driver Scheme; that MT29CC would continue to participate in the Owner Driver Scheme; that all the close corporations which participated in the Owner Driver Scheme would engage a new agent to manage and to develop their operations and that pending the engagement of such a new agent the defendant would fulfil the role of the liquidated Pro-Drive.

[12] It was a further averment made by the defendant in its plea that on the 21st November 2000 Cargo Carriers and Equity

Logistics were engaged as the new agents of the various participants of the Owner Driver Scheme to manage their operations and administration respectively.

[13] On the 14th February 2001 the Owner Driver Scheme participants, their aforesaid agents and the defendant agreed on the standard terms and conditions in order to regulate the transportation services. Those were set out in a document described as "Code of Conduct" – vide annexure S2 page 54 of the record.

[14] The defendant specifically denied that any agreement existed between the plaintiff and the defendant; that the defendant acted in breach of the agreement as the plaintiff alleged or otherwise; that the defendant prevented the plaintiff from rendering the agreed transportation services or that the defendant prevented the plaintiff from removing his property from the truck.

[15] The plaintiff's second claim was that he and the defendant entered into an agreement at Sasolburg during August 1999. The particulars of this claim are substantially the same as those of the first claim which are set out in paragraph 3 – 7 *supra*. However, the cause of action in this regard is different. Here the plaintiff's claim is based on past loss of earnings he suffered as result of the wrongful termination of the agreement. The loss is

confined and calculated from the date of the alleged breach on the 31st October 2001 to the 30th January 2003. The plaintiff issued summons in this action on the 9th March 2003. The plaintiff's alleged that he earned an average income of R13 816,09 per month from the defendant. During the said period he claimed that he lost the total sum of R207 241,00 in respect of past loss of earnings. In support of this second claim he attached annexure B1 and B2 – vide page 12 – 14 of the record.

[16] As regards the second claim the defendant denied all the allegations thereof as set out in paragraph 8 of the summons. The defendant specifically denied that the plaintiff earned any income from the defendant at any time material to this dispute. The defendant pleaded that the plaintiff derived income from the contractor MT29CC one of the many participants in the said scheme.

[17] The plaintiff's third claim is also chiefly based on the allegations as set out in paragraph 3 – 7 *supra*. The important difference is the cause of action. In this instance the cause of action is future loss of earnings for the remainder of the contract period, that is from the 1st February 2003 until 31st August 2004. During that period of nineteen months the plaintiff alleged he would have earned the sum of R263 504,00 from the defendant in

terms of the employment agreement had it not been for the defendant's breach. The defendant denied all the allegations.

[18] From the pleadings it is obvious that the defendant resists each of the three claims on the fundamental ground that no agreement was ever concluded between the defendant and the plaintiff in his personal capacity. Accordingly the crux of the resistance is that the plaintiff has no *locus standi in indicio* to bring the action against the defendant.

[19] The only relevant contractual nexus between the parties, so argued Mr. Krigeler, counsel for the defendant, was in terms of the defendant's employee empowering economic programme called Owner Driver Scheme in which the plaintiff participated not as an employee of the defendant but rather as a member of MT29CC from the 1st September 1999 to 31st August 2001. He contended that that corporate entity and not the natural persons who were its members was engaged as an independent contractor to perform transport services on behalf of the defendant. Therefore, he submitted that no legal relationship of employer-employee or contractual privacy ever existed between the plaintiff and the defendant.

[20] On the contrary, Mr. Grewar, counsel for the plaintiff,

argued that the plaintiff, as an employee, instituted this action against the defendant, as his employer, for the damages he has suffered on account of his service contract wrongfully terminated.

[21] Mr. Grewar submitted that there were numerous features in the conduct of the defendant which indicated that the relationship between the parties was based on employment. Since the plaintiff had made out a case which showed just that, he urged me to grant judgment in favour of the plaintiff in respect of each claim.

[22] Mr. Krigeler, disagreed. Contrary to the aforesaid submissions by Mr. Grewar he submitted that the plaintiff had failed to establish the employment contract or any of its terms between him and the defendant as he contended. He urged me, therefore, to dismiss all the three claims.

[23] I deem it expedient to give historical background of this dispute. The dealings between the parties were affected by some significant historic moments. I proceed to give a brief exposition of each era. This is gleaned from the evidence.

[24] During August 1999 the defendant created an economic empowerment scheme for its employees who were drivers. The defendant did so in collaboration with Pro-Drive, a corporate enterprise which specialised in the business of managing Owner Driver Schemes. The scheme was based on a standard operating agreement as more fully set out in annexure S1 which appears on page 44 – 73 of the record. A similar operating agreement was concluded with each participating driver employee. In order to participate

in the scheme each such employee had to do so through a close corporation. The steakholders to an operating agreement were Pro-Drive, Polifin, Future Bank, the contractor, its driver member, its crew member and its managing director.

[25] The relevant participating contractor in this case was MT29CC, consisting of Mofokeng as its driver member, Miyen, in other words the plaintiff, as its crew member and Heereveld as its managing member. It was a term of the operating agreement that Polifin, in other words the defendant, should appoint the contractor. Pro-Drive was appointed as a manager of the scheme as well as an authorised agent with the power to represent MT29CC in its business dealings with the defendant. On behalf of Pro-Drive Heereveld held 51% of the member's interest in MT29CC whereas Mofokeng held 25% and the plaintiff 24%. Only the defendant employee qualified to become principal members of any close corporation participating as a contractor in the scheme. The Owner Driver Scheme was primarily designed for them and not outsiders.

[26] To optimize benefits to industrious principal members, they were permitted in terms of the operating agreement to recruit even outsiders who were not former employees of the defendant and to offer them some stakes as crew members in their participating close corporation, the

contractor. Against that backdrop the plaintiff was introduced to Mofokeng by Mark Allen. On the recommendation of Allen Mofokeng offered the plaintiff a financial interest in MT29CC as a crew member. The Future Bank financed the trucks purchased by MT29CC in terms of the instalment sale agreement. The plaintiff and Mofokeng as members of MT29CC signed suretyship agreement in their personal capacity in favour of the Future Bank as co-principal debtors. As a surety the plaintiff like Mofokeng in his personal capacity undertook to pay the balance to the bank in respect of the truck should the MT29CC fail to pay. The defendant was obliged to pay the monthly instalment in respect of the trucks on behalf of MT29CC direct to Future Bank. The Multiparty Operating Agreement was short-lived. It was operative for about seven months only from the 1st September 1999 until about the 15th April 2000 when Pro-Drive was liquidated. This was the first significant era.

[27] Upon the liquidation of Pro-Drive the Multi Party Operating Agreement automatically came to an abrupt end. It became unable to perform its contractual obligations in terms of Clause 11 thereof. The void created by the demise of Pro-Drive was a serious blow to the Owner Driver Scheme. During the same month, April 2000, the participating contractors including MT29CC reached an

interim agreement with the defendant. However, the interim agreement was not reduced to writing. Instead an interim oral transport agreement was concluded.

[28] The material terms thereof were that the participating contractors would appoint a new agent to manage their administration and operations as soon as possible to replace the liquidated agent; that the oral transportation agreement and the new agency agreement would terminate simultaneously; that the defendant would step in the shoes of the former agent and act as a manager of the contractor's businesses in the interim in order to salvage the precarious situation of the Owners Driver Scheme. This was the second significant era.

[29] During November 2000 the oral transportation agreement was still in force. The mutual relationship between the parties between the defendant and all the participating contractors continued to be regulated in terms of the same oral transport agreement until Equity Logistics and Cargo Carriers became role players in the Owner Drivers Scheme. The two corporate entities took over from the defendant and became the new agent(s). The transient role of the defendant as a manager of MT29CC and others thereby came to an end seven months later in November 2000. Cargo Carriers provided vital support systems to facilitate efficient transportation of chemical products by the

participating contractors on behalf of the defendant to the defendant's customers. This then was the third significant era which lasted for approximately 3 months.

[30] The stakeholders are said to have adopted a code of conduct on the 14th February 2001. Of course that is the version of the defendant. The document was unsigned and the plaintiff questioned its adoption – vide p. 8 indexed documents bundle. The code of conduct precluded the members of the participating close corporation from removing the empty or unloaded trucks from the defendant's premises. The defendant was empowered in terms of the code of conduct to insist that any defect in the truck rendering it unroadworthy be repaired before any work was allocated to such a truck for the purpose of deliveries. The stringent procedures, standards and corporate norms were dictated by environmental and safety considerations since the truck transported highly dangerous toxic chemicals. The code of conduct represented the minimum standard of performance required and expected from each and every contractor. This was the forth important era.

[31] The fifth and undoubted the most significant era started on the 22nd October 2001 approximately eight months after the adoption of the code of conduct. Towards the end of

the previous era the plaintiff as OD189 found himself on a collision course with the defendant. He encountered numerous problems precisely because he would not comply with the norms and standard and procedures in other words in accordance with the code of conduct as well as the administration of the finances of the participating contractors such as MT29CC. He openly voiced out his dissatisfaction with the managing agent(s) as well as the defendant. On the 23rd October 2001 Cargo Carriers severed its business ties with MT29CC. The cancellation of such agency or management agreement completely paralysed the operations of truck OD189 in particular.

[32] Cargo Carriers gave such notice to MT29CC on 22nd October 2001 as more fully set out on page 236 of the document bundle. In turn the plaintiff took a retaliatory action by also cancelling all the MT29CC obligation in respect of truck OD189 to Cargo Carriers. The stalemate effectively eliminated the plaintiff's MT29CC from participating in the Owner Driver Scheme through OD189.

[33] In the sixth and final instance the defendant decided to cancel the transportation agreement with MT29CC. On the 31st October 2001 Da Silva gave notice to Cargo Carriers. The latter in turn gave such notice to MT29CC.

[34] The critical issue which has to be decided is the real nature of the relationship between the parties. By the parties I strictly mean the two litigants before me. The aforegoing historical background shows that the two litigants had a lot to do with each other for a period of twenty six months. Their regular and harmonious business dealings began effectively on the 1st September 1999 but ended on a tempestuous note on the 31st October 2001. The version of the plaintiff and the version of the defendant as to the real nature of their commercial relationship are mutually destructive.

[35] The plaintiff actively participated in the Owner Driver Scheme engineered and implemented by the defendant. Whether the plaintiff participated in the Owner Driver Scheme directly in his personal capacity as he avers or indirectly as a member of MT29CC as the defendant avers turns not only on the simple question: Did the plaintiff sign the operating agreement but also on the subsequent behaviour of the parties and the other signatories to the aforesaid operating agreement.

[36] Identifying persons as employers or employees is not difficult in most cases. There are, however rare fringe cases in which the status of individuals involved in a mutual and continuous business venture may not be readily

apparent. Sometimes it may not be immediately obvious whether the parties have clinched a deal which is a true contract of employment (the *locatio condictio operarum*) or a true contract of work (the *locatio condictio operis).* The latter, although entails the autonomous provision of work or service it does not entail the supervised provision of employment or labour. An autonomous provider of work or service is not an employee but an independent contractor. A supervised provider of labour is not an independent contractor but an employee.

[37] John Grogan: **Workplace Law**, 8th Edition on page 18 writes:

> ¡°Reported judgments in which the civil courts have struggled with these questions indicate that the task of distinguishing employees and employers from parties to other contractual relationships entailing the provision of work or services is not a matter of definition. The courts have frequently held that the classification of such contracts is a matter of substance, not merely of form. The mere fact, for example, that the parties have given their contract a particular label is not conclusive. The true nature of the contract is determined from the relationship between the parties.”

I am inclined to think that the peculiar facts of this case dictate that the court must pierce the corporate veil in order to take a closer look at the greater picture behind the scene. See **DADOO LTD & OTHERS v KRUGERSDORP**

MUNICIPAL COUNCIL (1920) AD 530, **GAYMANS v BEN MNGOMENI t/a WORKING WORLD PRETORIA** (2000) 9 BLLR 1042 LC. Not only the documents but also the conduct of those involved in the entire scheme of things must be scrutinized so as to gain a better understanding of the puzzle. The aim is to objectively ascertain the true character of the relationship which the parties before me have characterised in two different ways. One of the two labels must be fake.

[38] The defendants pleaded that there was no direct legal nexus contractual or delictual between the defendant and the plaintiff in his personal capacity. The defendant avers that whatever business dealings there were indirectly involved the plaintiff in his representative capacity as a member of the close corporation by the name MT29CC. In developing this contention further, counsel for the defendant submitted that the only logical inference that can reasonably be drawn upon proper construction of the written Multilateral and the oral agreements which governed the Owner Driver Scheme later is that only the close corporation as the contractor is entitled to sue the defendant and not the plaintiff in his personal capacity if the defendant has committed breach of contract by prematurely terminating it.

[39] The Operating Agreement appears from page 28 – 53 of

the record. The Operating Agreement purports to have been signed by among others, the defendant as well as MT29CC. The close corporation apparently had three members namely: MD Mofokeng whose individual signature as a driver member appears on page 51, PP Miyen whose individual signature as a crew member appears on page 52, JW Heereveld whose individual signature appears on page 52. Notwithstanding their signatures none of the two gentlemen are described as contractants. On the contrary the contractor is described as MT29CC with registration number CK97/68002/23. On page 53 two distinct signatures appear on a solid line above the words:

> "For and on behalf of MT29CC authorised thereto (the contractor)"

The first signature is admittedly that of Mr. PP Miyen, the plaintiff. The second signature is admitted to be that of MD Mofokeng, the driver member. This strongly suggest that the Operating Agreement was concluded between the defendant and MT29CC and not its individual members in their personal capacity. It is clear that they signed on the solid line in their representative capacity as the real and authorised members of the real contrator, MT29CC. The individual signatures of the members of MT29CC did not per se make them parties to the Operating Agreement in their own right. A close corporation is a legal *persona* who acts through its members. Da Silva contradicted the plaintiff's version and persisted that the plaintiff signed the document on 31st August 1999.

[40] The Operating Agreement is a twenty six page document. It was singed twice and initialled twenty four times by the plaintiff, yet he denies consciously signing or initialling it during or about the 31st August 1999. Instead he claimed in his indirect testimony that he first saw the document during or about June or July 2000. Almost a year from the effective date of the 1st September 1999. This is hard to believe.

[41] On the 26 August 1999 MT29CC purchased a 1999 commercial heavy truck in terms of a suspensive sale agreement through FBC Fidelity Bank Ltd for the price of R1 151 313,40. Four days later, on 30 August 1999 to be precise the plaintiff and the aforesaid Mofokeng signed a suretyship agreement and bounded themselves in their personal capacities in favour of the said bank in *solidum* as sureties and co-principal debtors jointly and severally with MT29CC as the principal debtor for the due fulfilment of the obligations of the said close corporation in terms of the suspensive sale agreement. Notwithstanding his apparent signature and initials on the suspensive sale agreement as well as the suretyship agreement he denied the authenticity thereof. Mofokeng contradicted the plaintiff's insinuations

that his signature and initials on both agreements with the said bank where fraudulently affixed to the documents.

[42] The suspensive sale agreement is part of the indexed document bundle which appears on page 301 and has to be read in conjunction with the following relevant clauses of the Operating Agreement:

- It is recorded that the contractor is purchasing the vehicle from FBC Fidelity Bank in terms of the instalment sale agreement – vide clause 2.1.
- Polifin hereby undertakes in favour of FBC Fidelity Bank that it shall, on the 25th day of each month, but only for so long as this agreement remains of full force and effect, pay to FBC Fidelity Bank on behalf of the contractor on debit order the monthly instalment due by the contractor and payable to the bank – vide clause 7.4.
- FBC Fidelity Bank hereby undertakes to send all statements of account, letters of demand, analysis of indebted transactional document and any other documentation whatsoever relating to the instalment sale agreement to Pro-Drive as the contractor's agent and to Polifin as the contractor's payer of the monthly instalment – vide clause 7.6.

- After the expiration of the instalment sale agreement provided all obligations in terms of the Operating Agreement and the instalment sale agreement have been discharged by the contractor, the driver member and the crew members the membership interest in the vehicle shall *ipso facto* be transferred to the three members of MT29CC, Herreveldt, Mofokeng and Miyen on the basis 51%, 25% and 26% (sic 24%) respectively – vide clause 11.5.
- Should MT29CC or any of its members be provisionally liquidated or sequestrated, or enter into any financial arrangements with its creditors or have any of its property attached or be convicted of reckless, negligent or intoxicated driving Pro-Drive shall be entitled to cancel the appointment of the contractor – vide clause 13.3 – 13.5.
- The contractor undertakes to comply timeously and properly with all its obligations under the instalment sale agreement and under all other relevant agreements – vide clause 14.
- Notwithstanding anything contained in this Operating Agreement the rights of the FBC Fidelity Bank in terms of the instalment sale

agreement shall not be diminished, compromised, novated or in any way prejudiced by anything contained in this Operating Agreement – vide clause 15.

[43] On page 169 of the document bundle appears a memo dated 7th February 2001 addressed to Sascon Management, in other words, the transport division of the defendant. It purports to have been signed by the plaintiff described as OD189 (P Miyen) and OD170 (D Mofokeng)). The memo was co-signed by B Maree of Cargo Carriers the new agent of MT29CC and S Mkhwanazi on behalf of the defendant.

[44] The signature which remarkably resembles that of the plaintiff of instance appears on the founding statement of MT29CC; the Multilateral Operaing Agreement, the suspentive sale agreement, the bank suretyship agreement; and the aforesaid memo, among others. The defendant led the evidence of Mofokeng and Da Silva on the issue. I find it difficult to believe that these several documents, many of which were destructive to the plaintiff's case, were deceitfully produced. It seems improbable that so many people would have ganged up against one innocent person for no apparent ulterior motive by perpetrating such an elaborate scam. I cannot accept that he was unaware of this massive documents and their

contents. In sharp contrast to the plaintiff's version, Mofokeng's version, with all its imperfections, was inherently more probable, consistent and trustworthy than the plaintiff's version.

[45] Mofokeng's version was corroborated by the massive body of documents as indexed in the documents bundle. He candidly gave clear and logical version. His version also drew significant corroborative and probative value from the plaintiff's own sworn statement as well as may other documents such as affidavits upon which the plaintiff relied in previous civil proceedings, for instance, the spoliation action he launched for the recovery of the truck. Mofokeng confirmed that he was a member of MT29CC. He stressed that there were various private correspondence and official documents as indexed in the documents bundle which confirmed that fact and accurately described the nature of the legal relationship between the defendant and the various participants in the Owner Driver Scheme. All such participants were indirectly connected or related to the defendant through their participating close corporation which was a vital component in the equation.

[46] Da Silva's evidence traversed correspondence, minutes of meetings and several documents of which he had personal knowledge. The essence of his version was that the plaintiff knowingly signed the Multilateral Operating

Agreement; that the plaintiff, therefore, did not sign any contract with the defendant in his personal capacity as he claimed and that the plaintiff participated in the Owner Driver Scheme not as an employee of the defendant but did so via his status as a member of the independent contractor, MT29CC. The various close corporations which conducted business with the defendant did so as independent contractors. The Owner Driver Scheme was designed to eliminate employees from the product transportation division of the defendant. The close corporations were established for that very purpose.

[47] At this juncture it is opportune to code clause 5 of the Multilateral Operating Agreement to which the plaintiff was a signatory as I have already found.

> "Clause 5 of the Multilateral Operating Agreement."
>
> ¡°It is specifically recorded that nothing in this agreement, whether express or implied, shall create or be deemed to create the relationship of master and servant or employer and employee between Polifin (Sasol Chemical Industries) and the contractor (MT29CC)."

The bracketed words are mine.

[48] Moreover clause 19 pertinently states that the Multilateral Operating Agreement constitutes the entire agreement between the parties and that none of these parties shall be bound by any term or representation or warranty or

promise not recorded in that contract. This completes my critique of the plaintiff's version.

[49] I now turn to examine the defendant's version. The parties held a pre-trial conference on 2 August 2005. The parties recorded the following in paragraph 13 of the minutes of the meeting:

> "Volgens Mnr. Conradie gaan die saak oor die eiser se skade wat gely is in sy persoonlike hoedanigheid. Mnr. Conradie het gestel dat dit nie die verweerder se saak was dat die beslote korporasie die eis moes instel nie."

To the extent that the aforegoing extract from the minutes referred to the first claim, there can be no serious argument about the correctness thereof. This is so because the particulars of claim and the evidence showed that the property claimed preponderantly belonged to the plaintiff and not MT29CC. I am not certain whether the same can be correctly said about the second and the third claim.

[50] The floundering fortune of Pro-Drive was a matter of great concern to the defendant. On the 5th April 2000 T S Munday, the managing director of Polifin Limited, in other words, the defendant, circulated the following letter among the members of the Owner Driver Scheme:

¡°5 April, 2000

COMMUNICATION TO OWNER-DRIVERS

Owner-driver structure/Prodrive

The cash flow problems at Prodrive (Pty) Ltd has placed the continuity of the owner-driver structure for Plifin's operations at risk.

Polilfin plans to put steps in place to:

- protect itself in terms of ensuring continuity of delivery of products to customers

¡Ü protect the owner-drivers and the concept of the owner-driver structure.

This may involve Polifin withdrawing from the structure set up by Prodrive and setting up new structures that may involve Polifin initially, as a non-voting and non-beneficial partner, participating with drivers in the structure until alternative participating parties can be sought.

The owner-driver members of the present Close Corporations must be aware that there may be adverse implications for them if the entire Prodrive structure changes in any way, including the possibility of it being liquidated. Polifin will endeavour to keep abreast of such changes, and try to assist with any reasonable steps to minimise the impact, if any, on the owner-driver members.

Signed ___________

T S MUNDAY

MANAGING DIRECTOR"

This communication was addressed not to the participating close corporation but to the individual members of the Owner Driver Scheme. This is significant to note. The Multilateral Operating Agreement was almost dead and a new Multilateral Operating Agreement was contemplated.

[51] The evidence showed that the Multilateral Operating Agreement expired in April 2000 consequent upon the liquidation of Pro-Drive. Therefore, the contractual relationship which until then existed between the defendant and MT29CC came to an abrupt end at the same time. The liquidation of the appointed intermediary between the defendant and the various close corporations *ipso facto* led to the demise of the various close corporations including MT29CC since Heereveld was a member of them all.

[52] Fifteen days later on 20 April 2000 Carlos da Silva, transport manager of Polifin Limited, wrote as follows to Mark Allen on behalf of the defendant:

"20 April 2000

Attention: Mr Mark Allen

SUBJECT: POLIFIN / OWNER DRIVER MANAGEMENT

This writing serves to advise that it is our intention to award Contract to yourselves for the operational management and administration of the owner drivers currently rendering a service to Polifin's Midland Factory, Sasolburg.

We are now in the process of drafting an agreement for your perusal and comments and will forward such to you in due course. In the interim you can forward your invoice dated from 5 April 2000 to 30 April 2000 to our mrs. Marie Coetzee for processing.

Yours faithfully.

Signed ________ Signed ________

C DA SILVA **L JANSE VAN RENSBURG**
TRANSPORT MANAGER **CONTRACT OFFICER**"

[53] Some interesting things emerged from this letter. First, it was the intention of the defendant to award to Mark Allen an operational agreement and administration contract in respect of the individuals and not the close corporations. By then the close corporations no longer existed. Again the letter of intent intimated that a new Multilateral Operating Agreement was in the drafting process to replace the old Multilateral Operating Agreement. It also emerges from this letter that Mark Allen had already taken over the functions of Herreveldt practically from 5 April 2000. However, unlike Herreveldt, Mark Allen was concerned with the individual owner-drivers and not the close corporations as such.

[54] On 4 Mary 2000 Miyen, the plaintiff, addressed the following letter to the defendant:

"4 May 2000

Polifin Limited

PO Box 321
SASOLBURG
9570

Attention: Mr Carlos da Silva / Mr Mark Allen

APPOINTMENT OF POLIFIN LIMITED AND MARK ALLEN TO MANAGE ON BEHALF OF THE POLIFIN OWNER DRIVERS IN THEIR PERSONAL CAPACITY

We, collectively known as the Polifin Owner Drivers, hereby appoint Polifin Limited and Mark Allen as of 1 April 2000, to manage our transport business on our behalf for an interim period only. This appointment is valid until such time as we, along with Polifin Limited, can appoint a new management company or other body to assist us in the management of our owner driver scheme.

This appointment is limited to the following and is given by the Polifin Owner Drivers in our personal capacities to ensure that our interest in our transport business are maintained and well looked after

1. Mark Allen

   Mark Allen will be responsible for

   - the day to day management of our business, this includes the scheduling of the work, arranging maintenance and insurance for our vehicles, liaising with all our service providers such as Mastertreads, Johandre, Sasolburg Taxi's and all other service providers who directly supply us with their services.
   - liaising with Polifin on the payment of all our accounts, this includes accounts such as the maintenance, insurance, medical aid, provident fund, all our service providers' invoices and our Nu-Bank accounts, cellphones and our own salaries.
   - keeping records of the work done by the Owner Drivers for Polifin and invoicing Polifin on a monthly basis for such work.
   - and all other services as set out in an agreement still to be signed between ourselves, Polifin and Mark Allen.

2. Polifin

   Polifin will be responsible for

   - the financial management of our business in co-operation with Mark Allen.
   - issuing the Owner Drivers with monthly statements of

our financial affairs.

- and all other services as set out in agreement still to be signed between ourselves, Polifin and Mark Allen.

The Owner Drivers will pay to Polifin and Mark Allen the management fee as was previously paid to ProDrive for similar services rendered and all other rights and obligations of the Owner Drivers will be as set out in an agreement still to be signed between ourselves, Polifin and Mark Allen.

The above is only an interim appointment and does not constitute any master / servant relationship between any of the parties mentioned herein.

Herewith signed by Papi Miyen in his personal capacity as part of the Polifin Owner Driver team rendering a transport service to Polifin.

Signed_____________

SIGNATURE"

[55] The letter makes it abundantly clear that the plaintiff was writing on behalf of the owner-drivers in their personal capacities and not in their indirect capacities as members of the close corporations which previously participated directly in the Owner Drivers Scheme during the era of Herreveldt's Pro-Drive. The issue of personal capacity was stressed by highlighting it in the heading of the letter. On page 1 of the letter the plaintiff reiterated that the appointment of Carlos da Silva and Mark Allen was an interim measure given by "the Polifin owner-drivers in our personal capacities to ensure that our interest in our transport business are maintained and well looked after". He concluded the letter by once again emphasizing that he signs the letter in his personal capacity as part of the owner-driver team.

[56] The Multilateral Operating Agreement was never replaced with another Multilateral Operating Agreement. Instead it was replaced with the code of conduct. Mr. Carlos da Silva admitted during cross-examination that the code of conduct was really not a binding agreement. Mr. Grewar argued that in the workplace environment documents such as code of conduct or code of good practice are customarily used to regulate the employment relationship. *Vide* p. 3 indexed document bundle.

[57] The plaintiff and apparently all the individuals who rendered the transport service to the defendant in terms of the Owner Drivers Scheme were personally identified by means of company identity cards. The name of the defendant was printed bold on the face and at the back of such a company identity card. The name of the plaintiff was likewise printed on the back as was the registration number of his truck. However the name of the participating close corporation MT29CC appeared nowhere on the company identity card. The dominant impression created *ex facie* the card was that the bearer whose name and indeed whose photograph appeared thereon was an employee of the defendant. *Vide* p. 1 – 2 of the indexed document bundle.

[58] The plaintiff received in his personal capacity monthly payments in respect of his income directly from the

defendant and not from the MT29CC. No reference of any sort was made to this close corporation. It seems to me the same applied to all operating driver participants. *Vide* p. 27 and 111 of the indexed document bundle.

[59] The defendant made out cheques in favour of the plaintiff in his personal capacity and not in the name of the close corporation MT29CC. *Vide* p. 109 – 110 indexed document bundle. Such cheques were described as salaries. Also *vide* p. 98 of the indexed bundle.

[60] The transactions incurred in respect of the running expenses of truck JPH146GP owned by the plaintiff, driver OD189 were debited against the plaintiff's personal account and not that of MT29CC, if it ever existed. *Vide* p. 139.

[61] Several meetings were held between the defendants and the owner-driver participants in their personal capacity and not in their representative capacities as members of the close corporations before Pro-Driver was liquidated. *Vide* pp. 113, 119, 127, 131, 149, 198, 216 and 248 of the indexed document bundle.

[62] The plaintiff paid some creditors such as Garden City Motors in his personal capacity and not out of the coffers of MT29CC for the repairs done to his truck. *Vide* p. 229, 231

and 235. Equity Logistics and Cargo Carriers, the supposed facilitators of the defendants' scheme were aware but unable to intervene.

[63] These then are some of the strange features of the defendants' conduct which tend to blur the real nature of the relationship between the parties.

[64] On 24 May 2001 the founding statement was amended by way of form CK2. The form shows on p. 2 thereof that by then the close corporation had only two members, D.M. Mofokeng - 50% and P.P. Miyen – 50%. The former majority stakeholder J.B. Heereveld had in the meantime been removed in terms of an arbitration award by Adv. K. Moroka of Johannesburg.

[65] What emerges from the massive documentary evidence and oral evidence presented in this case clearly shows that Pro-Drive, as well as the defendant itself, exercised extensive powers of control in the general affairs of the close corporations participating in the Owner Driver Scheme. Mr. Grewar contended that the participating close corporations appeared as if they were independent entities in theory only and that numerous factors indicate, that they were practically deprived of their corporate autonomy, particularly MT29CC.

[66] The following factors tend to give credence to counsels contention. The members never held one simple meeting, according to Mofokeng; the two drivers, Mofokeng and Miyen, were paid salaries by the defendant; the income due to the close corporation by the defendant was never channelled to MT29CC as the independent contractor for the mutual benefit of its members; instead such income which was strangely described as salaries and directly deposited into the bank accounts for the credit of the individual members of the close corporation; substantial amount of money due to the close corporation was buried or statched away in a trust account according to the whims of the defendant; the members of the close corporation, especially the plaintiff, is still in the dark as to how such trust funds were utilised or invested; the two minority members of MT29CC had separate business creditors; such creditors were separately paid by the defendant and not their supposed corporative enterprises; the income generated by one member of MT29CC could not be utilised to defray the business debts incurred by another member of the same close corporation; no annual financial statements of MT29CC were ever prepared; after the liquidation of Pro-Drive the relationship between the defendant and its natural transport providers or chemical distributors became even more blurred; the defendant drafted what became known as a code of conduct to regulate its business dealings with its chemical distributors

in the individual and personal capacities; soon after the defendant had terminated its contract with MT29CC on 31 October 2001 the plaintiff's truck was simply recycled and quickly allocated to someone else at the specific request of the defendant. The new buyer participated in the aforesaid scheme of the defendant. On 1 November 2001, a day after such termination Da Silva wrote to Nedcor Bank:

"Mr. J Budeli

Snr. Manager credit

Nedcor
Johannesburg

1/11/01

SASOL'S OWNER DRIVER SCHEME

Dear Sir

I herewith wish to inform you that we have terminated our relationship with two of the CC's as per the attached letter.

Be advised that said vehicles are secured at Sasol and Cargo Carriers respectively. In terms of the original agreement said vehicles remain an integral part of the scheme and attachment procedures should proceed so that said vehicles can be re-allocated to other CC's

Our business will peak towards the end of November and said vehicles are critical to our operation. I would appreciate your urgent attention on this matter.

Yours faithfully

Signed__________

C Da Silva

Manager Sascon

cc: T.L. Smith"

[67] The following passage by the author: Boberg: **The Law of Delict,** p.1 is worth quoting:

> "A delict is a civil wrong. It is an infringement of another's interest that is wrongful irrespective of any prior contractual undertaking to refrain from it. It entitles the injured party to claim compensation in civil proceedings. A single act may give rise to both delictual and contractual, ... liability. The existence of concurrent contractual liability is no bar to action in delict, provided that the requirements of delictual liability are also satisfied."

See **PILKINGTON BROTHERS SA (PTY) LTD v LILLICRAP, WASSERMAN & PARTNERS** 1983 (2) SA 157 (W).

[68] Mr. Kriegler submitted that the cancellation by Cargo Carriers of MT29CC strikes at the heart of the plaintiff's case that the defendant through its breach of contract, or alleged commission of delict, has caused the plaintiff's loss. In developing this argument further he contended that any wrongful conduct by the defendant, as alleged by the plaintiff, must have been committed on 31 October 2001 and thereafter. He argued that the real cause of its decision on 31 October 2001 was precipitated by the cancellation by Cargo Carriers of its management agreement on 22 October 2001 which cancellation was accepted by the plaintiff on 22 October 2001. He submitted

that it was the mutual cancellation of the management agreement by the plaintiff and Cargo Carriers which precluded the plaintiff or MT29CC, for that matter, from carrying out any chemical transport work on behalf of the defendant and thus rendered it impossible for the plaintiff or MT29CC to perform the contractual obligations it owed to the defendant. He submitted that on this premise any unlawful conduct on the part of the defendant, if any, subsequent to the plaintiff's own decision to dismiss Cargo Carriers coupled with Cargo Carriers cancellation of its management agreement with the plaintiff and its withdrawal of the plaintiff's petrol card, was causally irrelevant to any loss of income by the plaintiff. The contention that the plaintiff, alternatively Cargo Carriers, was to blame for the loss suffered by the plaintiff, is not without substance.

[69] The defendant relied on two grounds to justify its contention that it lawfully terminated the transport agreement it had concluded with MT29CC. In the first place it contends that MT29CC itself repudiated the transport agreement as the defendant pleaded in par. 5.2.2 of its plea. In the second place it contends that the cancellation of the maintenance agreement by Cargo Carriers *ipso facto* terminated the transport agreement between the plaintiff and the defendant and since the transport agreement and the maintenance agreement were co-extensive and symbiotic. Therefore the defendant relies on the repudiations pleaded in par. 5.2.1

and 5.2.2 of its plea to justify the summary termination of the transport agreement between itself and the plaintiff. Such repudiations were material breach as pleaded in par. 5.2.3 read with par. 4.3.2.4. In essence the contention of the defendant is that the plaintiff and not the defendant was in breach of the transport agreement.

[70] The decision to terminate the transport agreement between the defendant and MT29CC was taken by Da Silva on behalf of the defendant and communicated to Cargo Carriers by written notice dated 31 October 2001. In turn Cargo Carriers gave notice to MT29CC of the defendant's decision. It seems to me that the plaintiff was an assertive individual and an outspoken critic of the Owner Drivers Scheme. He was increasingly becoming frustrated by the domineering practices, procedures and systems which virtually deprived MT29CC from running its affairs as an autonomous corporate entity. It is clear to me that he was regarded as a troublesome outsider. In his frustrations he found himself on a collision course with some powerful individuals in the mighty empire of Sasol Infrachem Limited. He too behaved in a manner which adversely affected the operations of the defendant. He perceived the entire owner-drivers system as a cunning device designed to exploit the unwary owner-drivers who participated in it and not as a genuine vehicle designed for the true economic empowerment of the employees of this top corporate entity. He paid dearly in the

end.

[71] He lost his truck, he lost the money he had already paid to FBC Fidelity Bank, he lost his share in the sum of R249 459,75 held in a certain trust account for the credit of MT29CC. The bank statement by Future Bank, in other words FBC Fidelity Bank Limited, *prima facie* shows that the outstanding balance due by MT29CC as in November 2001 was R136 189,52. Yet the defendant was held liable by the same bank on 14 November 2001 for R1 044 628,54. He was later sued for that staggering amount in the Free State High Court under case no. 4140/2001. He lost in the end. No wonder he cried in the witness box during the course of this trial. However his credibility was seriously dented by the discrepancies between affidavits he made in support of his opposition to the summary judgment in that case and his court testimony in these proceedings.

[72] The plaintiff's version that he was prevented from performing his duties by the defendant on 31 October 2001 was denied by Vosloo. Vosloo denied that a trailer was hooked to the plaintiff's truck. This was in contrast to the plaintiff's version that he was about to leave the defendant's factory to deliver a load to a customer on behalf of the defendant. The plaintiff could not drive out of the defendant's premises. His electronic booth card had been deactivated. A security guard at the gate told him to contact defendant's

management about the matter. Vosloo became involved and ordered the plaintiff to leave the truck since it was contrary to company policy for a truck to drive out at that time without a load. The plaintiff obeyed the instructions.

[73] It seems to me that the version of the plaintiff was more probable than that of Vosloo. Vosloo’s behaviour once again demonstrates the dominant control the defendant exercised over the plaintiff. Following the cancellation of the Multilateral Operating Agreement in April 2000 the defendant had no binding agreement with MT29CC. Therefore the defendant had no right to prevent the plaintiff from removing the truck. The plaintiff did not voluntarily leave the truck there as Vosloo would want me to believe. He was forced to leave the truck there. He parked the truck, locked his personal belongings inside and left the truck there in accordance with the defendant’s orders. It is clear that he did so under protest. It is also clear that the defendant wanted to retain the truck in its operations as was evidenced by the letter to Nedcor Bank soon after this indicent.

[74] The contention that the defendant lawfully instructed the plaintiff to return the truck to his premises, as the code of conduct required, is a thin argument. The code of conduct in question was never signed by the plaintiff. Therefore it was not a binding agreement on which the defendant could rely. If the plaintiff removed the truck from the defendant’s

premises it was the business of FBC Fidelity Bank to take the necessary steps to recover it from the plaintiff. The defendant had no business to repossess the truck from the plaintiff on behalf of FBC Fidelity Bank. At any rate Vosloo did not claim to act in terms of such a code of conduct. I therefore find that the defendant indeed despoiled the plaintiff of his truck. However, such a finding is of no real consequence since the plaintiff had abandoned it and his application at the commencement of his proceedings to re-introduce it was turned down. It is now water under the bridge.

[75] The question is whether it can be said that the defendant despoiled the plaintiff and unlawfully deprived him of his lawful possession of his property other than the truck itself. In my view, the answer has to be in the negative. The defendant prevented the plaintiff from removing the truck and the truck only. The plaintiff on his own chose to leave his personal belongings in the truck. He was at liberty to remove his personal property from the truck and take it away from the defendant's premises. The defendant had no interest in the plaintiff's personal property.

[76] The evidence shows that the plaintiff himself locked his property inside the truck and left it there. Moreover, he retained the key of the truck. The truck remained on the defendant's premises until it was repossessed by FBC

Fidelity Bank about three weeks later on 20 November 2001. I did not hear the plaintiff during the course of his evidence to say that during that period he returned to the defendant's premises, attempted to remove his personal property but was prevented from doing so by the defendant. In the circumstances I find that the defendant did not dispossess the plaintiff of his personal property. I am therefore inclined to turn this first claim down.

[77] As regards the second claim, the version of the plaintiff and the version of the defendant are mutually destructive. The second relief sought is the recovery of accrued loss of earnings allegedly owning by the defendant to the plaintiff arising from a breach of employment agreement.

> "Eiser stel 'n eis teen sy voormalige werkgewer vir skade wat hy gely het uit hoofde van s diensbeëindiging."

This was the principal submission made by Mr. Grewar on behalf of the plaintiff. The whole foundation of the plaintiff's case was therefore based on an alleged employment relationship. This is the gist of the plaintiff's claim.

[78] The alleged employment relationship was denied by the plaintiff.

> "The contractor's appointment was expressly not the individual members of MT29CC, but confined to the contractor or corporate entity, as paragraph 1.2.1 read with paragraph 8 makes it plain. Consistently with that proviso, Polifin's

> obligations to make payment extended to the contractor and not to the individual close corporation members themselves."

So submitted Mr. Kriegeler. This is the crux of the defendant's defence.

[79] Writing on behalf of the owner drivers in their personal capacities on the 4th May 2000 P.P. Miyan himself described the nature of the relationship between Polifin Limited in the following unambiguous terms:

> "The above is only an interim appointment and does not constitute any master and servant relationship between any of the parties mentioned herein."

Vide p. 85 of the documents bundle. This strongly militates against the plaintiff's contention that his entire claim was based on employment agreement. The particulars of precisely when and where the alleged employer-employee relationship came into existence after the 4th May 2001 are nowhere to be found upon examination of the plaintiff's evidence. Although the above quotation suggests that he regarded himself as a an independent contractor, that is not the cause of his action according to his summons.

[80] The defendant heavily relied on numerous documents in support of its contention that no employment agreement ever existed between itself and the plaintiff. Perhaps the most

important of such documents is the multilateral operation agreement which effectively came into operation on the 1st September 1997. Paragraph 5 thereof states:

> ¡°It is specifically recorded that nothing in this agreement, whether express or implied, shall create or be deemed to create the relationship of master and servant, or employer and employee, between Polifin and the contractor."

The word contractor is defined in paragraph 1.2.1 as the MT29CC and the definition implicitly excludes the natural members of this corporate entity of which the plaintiff is one. I have to mention that the document bears the signature of the plaintiff.

[81] I have previously highlighted several unsatisfactory features contained in the defendant's documents. The domineering of the close corporation and their individual members by the defendant and its spoliation of the plaintiff, however, all this negative aspects should not blind us to the salient principle of our civil law.

[82] It is trite that the plaintiff bears the overall onus to prove, on a balance of probabilities, that the defendant was his employer as on 31 October 2000. The enquiry at the conclusion of the case remains whether the plaintiff has on a balance of probabilities discharged the onus of establishing the foundation of his claim and that there was a factual connection between the damages he has suffered and the

wrongful breach of the alleged contract of employment which breach is attributable to the defendant. *Vide* **STACEY v KENT** 1995 (3) SA 344 (ECD) at 352 i per Kroon J.

[83] In an enquiry of this nature the explanation given by the defendant will have to be tested by considerations of probability and credibility. I have already pointed out that as regards the merits the versions put forward by the plaintiff and the defendant are virtually irreconcilable. In such circumstances the approach which the court should adopt has recently been stated as follows:

> ¡°The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

STELLENBOSCH FARMERS' WINERY GROUP LTD AND ANOTHER v MARTELL ET CIE AND OTHERS 2003 (1) SA 11 (SCA) at par. 5 per Nienaber JA who spoke for the majority.

[84] In the instant case the credibility of the plaintiff was seriously dented by serious contradictions between his oral court testimony and his previous inconsistent affidavits as well as his previous correspondence. Moreover, the general probabilities significantly favour the defendant's version. It is

highly improbable that so many documents bearing the plaintiff's signature and the signatures of many other people could have been contrived and produced without the plaintiff's knowledge and conscious collaboration. It is highly improbable that the plaintiff could have been so involved in the owner-drivers scheme for almost a year before he became aware of the fraud perpetrated in his name. As regards the credibility considerations the scale tilts in favour of the defendant. Similarly as regards the probability considerations the score is still in favour of the defendant. The two criteria are not at all equiposed. Both move me in one direction. The direction in which I am convinced to move is that, on a balance of probabilities, there was no relationship of employment between the parties.

[85] On the facts the distinction between MT29CC and its members must be acknowledged. Similarly a distinction between MT29CC plus its members on the one hand and Polifin Limited on the other hand must also be acknowledged. There is a lot in the plaintiff's own version that gives credence to the defendant's version, notwithstanding its negative and unsatisfactory aspects. Among others he wrote as follows on the 4th May 2000:

> "The above is only an interim appointment and does not constitute any master/servant relationship between any of the parties mentioned herein."

See p. 85 of the indexed document bundle.

Therefore in the absence of any proven agreement of employment between the parties the plaintiff could not have suffered any past loss of earnings recoverable from the defendant. It follows, therefore, that even if the defendant was in breach, the plaintiff had no legal basis on which to sue the defendant. The premature cancellation of the agreement was a contractual matter between the defendant and MT29CC of which the plaintiff was a member. He would not have derived from such agreement any direct personal right to sue the defendant. In such a scenario he would not have had *locus standi* to enforce it. Therefore I would dismiss the second claim.

[86] As regards the third claim which relates to future loss of earnings the same views I expressed and the same findings I made in respect of the second charge, are as valid here and now as they were then and there. They apply equally well here. Therefore, I would also dismiss this third claim as well. In all these three claims I could find no causal connection, contractual or delictual between the plaintiff's loss and the defendant's act.

[87] The Owner Drivers Scheme was created with good intentions but it was horribly managed and administered. The intended beneficiaries were never trained and

developed to understand the intricacies of running their own business. The distinction between their close corporations and its members appears to have being a strange legal concept which the plaintiff and apparently his fellow owner-drivers never really understood. The defendant's dominant involvement in the business affairs of the close corporations created a great deal of confusion, suspicion and perception that the plaintiff and other owner-drivers were treated like glorified employees. This meddling by the defendant precipitated this conflict. In the light of this, I am of the view that the defendant, though successful, is not entitled to the fruit of its success. Therefore I would make no order as to costs.

[88] Accordingly I make the following order:

88.1 The plaintiff's three claims are dismissed.

88.2 There is no order of costs.

M.H. RAMPAI, J

On behalf of plaintiff: Adv. D.M. Grewar

Instructed by:
Cobus le Roux Attorneys

BLOEMFONTEIN

On behalf of defendant: Adv. M. Krigeler

Instructed by:
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BLOEMFONTEIN

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